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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1356

KATHY SUE JOHNSON, ETC., ET AL., AND
DARCEL MILTON, ETC., ET AL.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MICHAEL J. MURRAY,
228 North LaSalle Street,
Chicago, Illinois 60601,
Attorney for Respondents.

RICHARD E. GIRARD,
Of Counsel.

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To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Respondents respectfully submit that the judgment and opinion in this cause of the United States Court of Appeals for the Seventh Circuit correctly stated the law as enunciated in prior decisions of this Court and other lower courts. The judgment and opinion are not in conflict with any decision of any other Court of Appeals and raise no important issue of federal law.

QUESTION PRESENTED.

Whether in view of the findings on the record the Court of Appeals was correct in holding that the stabilization quota plans which were directed toward prevention of *de facto* segregation in schools located in changing neighborhoods and which provided all students residing in the attendance area with a meaningful opportunity to attend an integrated high school were constitutionally permissable.

STATEMENT OF THE CASE.

In addition to using their "Statement of the Case" as a vehicle for argument rather than a true statement of the case, petitioners have been somewhat less than frank and honest in the presentation of facts and argument. They have omitted some of the most pertinent facts on which the trial court and the Court of Appeals relied and pointed out in their various opinions and in their argument petitioners have tried to mislead the Court.

It is necessary, therefore, to present this statement of the case.

The attendance areas for two Chicago public high schools, Morgan Park and Gage Park, were in part undergoing accelerated racial change from white to black in 1975 and 1976 and the two schools were also overcapacity because of increasing enrollment (A 34, finding of fact ¶ 4). Morgan Park High School is at 1744 W. Pryor Avenue (11200 South) and Gage Park is 5600 South Rockwell (2600 West) (A 34, ¶ 1).

During the period from 1972 to 1975 black student enrollment at Morgan Park High School had increased from 52.3% to 62.3% and white student enrollment had declined from

45.7% to 36.9%. Total enrollment had increased from 3092 to 3423. As of January 30, 1976, Morgan Park High School was operating at 128.6% of capacity. (A 34, ¶ 5). During the period 1972 to 1974 black student enrollment at Gage Park had increased from 1056 to 1361 and the school was operating at 106% of capacity (A 35, ¶ 16).

Student racial stabilization quota plans were instituted on May 14, 1975 at Gage Park High School (A 7) and on March 10, 1976 at Morgan Park High School (A 10). A lottery system was used to fill the quotas. The district court's findings of fact stated:

> "These plans were attempts on the part of the Board to relieve overcrowding and to promote integration in schools situated in rapidly changing neighborhoods. Experience has shown that the Board has achieved both objectives at each school. The racial balance at Gage Park High School is 45.4% black, 41.9% white, 12.7% other, and the racial balance at Morgan Park High School is 59% black and 41% white." (A 40, ¶ 26).

Students not admitted to the two schools under the lottery are provided counseling to encourage them to attend other integrated Chicago public high schools with bus transportation provided by the Board from a convenient point in their neighborhood. Over 350 minority students in the 1978-1979 school year alone were taking advantage of the Plans and were bused by the Board to other integrated high schools. (A 14).

The Court of Appeals on the basis of findings on the record stated (A 18):

> "In the case at bar, the Chicago Board of Education voluntarily adopted a desegration plan designed to prevent *de facto* racial segregation at two public high schools. The record is uncontroverted that prior to the implementation of the Plans, the attendance areas for Gage Park and Morgan Park High Schools were rapidly changing in residential occupancy from white to black and the trend in

> enrollments was toward segregated student bodies. The district court found, based on a voluminous record, that the Plans successfully arrested this trend and concluded that, as a result of the Board's modification of the Plans, all high school students living in those attendance areas were provided with a meaningful and viable opportunity to attend an integrated high school."

The viable opportunity to attend an integrated high school which the lower courts concluded is being offered to all students living in the Gage Park and Morgan Park attendance areas would not have existed in absence of the stabilization plans, based on the Board's experience throughout the city. (A 21). In contrast to Morgan Park and Gage Park High Schools where "the Plans successfully arrested this trend (toward segregated minority enrollment) . . . (A 18)", enrollment at Fenger, Orr, Bowen, and other Chicago public high schools located in changing neighborhoods in various parts of the city became segregated minority in the absence of such Plans (A 7, 21)*. These three high schools are not isolated examples of the segregative effect that racial change in residential occupancy has had on public high school enrollment in Chicago in the absence of a stabilization plan. They are in dispersed locations in the Southeast (Bowen), Southwest (Fenger) and Northwest (Orr) parts of Chicago. Although Kenwood Academy has remained 26% white for several years with no Plan similar to those at Gage Park and Morgan Park High Schools, it is a unique school located at 5015 South Blackstone Avenue, some distance from Morgan Park or Gage Park High Schools and in the immediate vicinity of the University of Chicago. Gage Park and Morgan Park High Schools are unlike Kenwood as we hereinafter show in Reasons for Denying the Writ.

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* See also Student Racial Surveys (pltfs. exhs. 50, 54) 1970 Survey; Fenger H. S. (page for District 18); Orr H. S. (page for District 25); Bowen H. S. 9 page for District 179; 1975 Survey; Fenger H. S., p. 31; Orr H. S., p. 29; Bowen H. S., p. 21.

The petition makes allegations, refuted by the record, that the Plans "were adopted over the express and determined opposition of the black community" (petn. p. 5), or were "designed to exclude black children from Morgan Park and Gage Park High Schools" or that the plans were ineffective in reversing the decline in white student enrollment (p. 5). Even a general understanding of the facts in this case would show how incorrect such remarks are. First, the record discloses that the "black community" was not opposed to student racial stabilization quota plans. (Transcript, April 29, 1976 at p. 22.) Mrs. Shelby Johnson, who was authorized to speak for the other plaintiffs, stated at the hearing on petitioners' motion for restraining order that she was not opposed to racial stabilization quotas. Although she differed with the quota levels recommended by the Area A Committee after public meetings in the community and adopted by the Board, Mrs. Johnson stated "The Morgan Park Committee have told Mr. Burke (Principal), Mr. Moore (District Supt.), and everyone else that we are not against the 50-50 ratio. . . ." (Transcript, April 29, 1976, at 22).

Secondly, with respect to petitioners' contention that the Plans were intended to exclude only minority students, the Court of Appeals stated (A 22):

> "In this case, there is no basis in the record to support the contention that the racial quotas imposed were intended to retard integration and to create racial imbalance at these two high schools. On the contrary, it is evident that the Board's voluntary action was motivated by a good faith effort to stabilize the enrollments at Gage Park and Morgan Park High Schools, and to promote integration *not only at these two high schools but also at alternative high schools designated under the Plans.*" (emphasis added).

Equally important, the Court stated (A 26-27):

> "that when the white enrollment exceeded the established quotas they also would be denied admission. . . . Indeed, the racial quotas established for each high school permitted

> more minority students than white students to enroll, even though the white student population exceeded the non-white student population residing in the attendance areas serving these schools."

Finally, the Court declared with reference to the stabilizing effect of the Plans (A 27):

> "As the district court found, the racial balance at Gage Park is 58.2% nonwhite and 41.9% white, and the racial balance achieved at Morgan Park is 59% nonwhite and 41% white."

Although substantially more white students* than black students reside in the Gage Park and Morgan Park High School attendance areas (A 35, ¶¶ 5, 6), substantially more minority students than whites are permitted to enroll at the two schools under the Plans. With respect to relieving overcrowding and promoting integration in schools situated in rapidly changing neighborhoods, the district court found "the Board has achieved both objectives at each school (A 40, ¶ 26)". The trial court concluded that the voluntary transfer Plans as modified by the busing provision made available to petitioners a meaningful opportunity to attend a Chicago Public high school in an integrated setting and they would suffer irreparable injury if the Plans were abandoned (A 48-49, ¶¶ 5, 7).

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* The decline in white enrollment was attributable at least in part to the fact that white students were enrolling in parochial schools serving the attendance areas for these two schools (A 23). The parochial school system operated by the Chicago Archdiocese is the sixth largest school system in the United States.

REASONS FOR DENYING THE WRIT.

I.

THE STABILIZATION QUOTA PLANS AT GAGE PARK AND MORGAN PARK HIGH SCHOOLS PREVENTED DE FACTO SEGREGATION, PROVIDED A MEANINGFUL OPPORTUNITY FOR ALL STUDENTS TO ATTEND AN INTEGRATED HIGH SCHOOL AND WERE RIGHTLY HELD TO BE CONSTITUTIONALLY PERMISSIBLE BY THE COURT OF APPEALS.

The Court of Appeals held, based on findings on the record, the stabilization quota plans which were directed toward prevention of *de facto* segregation in schools located in changing neighborhoods and which provided all students residing in the attendance areas with a meaningful opportunity to attend an integrated high school were constitutionally permissible (A 25-26). This is not a civil rights action where school authorities are alleged to have engaged in intentional, discriminatory acts. Precisely to the contrary, there is no contention of *de jure* segregation. Petitioners seek to destroy a successful effort to prevent *de facto* segregation in public schools even though

> ". . . it is evident that the Board's voluntary action was motivated by a good faith effort to stabilize the enrollments at Gage Park and Morgan Park High Schools, and to promote integration *not only at these two high schools but also at alternative high schools designated under the Plans.*" (A 22.) (Emphasis added.)

Public school authorities have discretionary power in limited circumstances of voluntary affirmative action and in the absence of invidious intent, to implement the kind of remedial plan to prevent *de facto* segregation which the lower courts have upheld in the instant case.

As stated by the Court of Appeals (A 17):

> "In reviewing various integration solutions promulgated by local school boards, the Supreme Court has consistently recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley,* 418 U.S. 717, 741-742 (1974); *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1, 49 (1973); *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 469 (1972)."

This Court has expressly recognized that in taking voluntary steps to alleviate *de facto* segregation there are "broad discretionary powers of school authorities . . ." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 at 16 (1971). In *McDaniel* v. *Barresi,* 402 U. S. 39, 41 (1971), involving the busing of black students to other than their neighborhood schools, this Court declared:

> "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race'. . . . Any other approach would freeze the status quo that is the very target of all desegregation processes."

Other Federal courts, the Illinois Supreme Court, and courts in other jurisdictions have consistently upheld the authority of school boards to formulate and implement voluntary programs designed to prevent *de facto* segregation. As stated in *Tometz* v. *Board of Education, Waukegan City School District No. 61,* 39 Ill. 2d 593, 237 N. E. 2d 498 (1968):

> "State laws or administrative policies, directed toward the reduction and eventual elimination of *de facto* segregation of children in the schools and racial imbalance, have been approved by every high State court which has considered the issue. . . . Similarly, the Federal Courts which have considered the issue . . . have recognized that voluntary programs of local school authorities designed to alleviate *de facto* segregation and racial imbalance in the schools are not constitutionally forbidden . . . ."

Petitioners erroneously contend in a footnote (petn. p. 17) that voluntary programs to alleviate *de facto* segregation such as the

Gage Park and Morgan Park plans are constitutionally permissible only where each school in the entire city "would reflect the district-wide racial make-up." Contrary to petitioners' contention, this Court has consistently held that there is no constitutional right to a particular degree of racial balance or mixing in the schools. *Swann supra,* at p. 24; *Pasadena Bd. of Education* v. *Spangler,* 427 U. S. 424. An order contemplating the "substantive constitutional right (to a) particular degree of racial balance or mixing" is therefore infirm as a matter of law. *Spangler, supra,* at 434. See also *Milliken* v. *Bradley,* 433 U. S. 267, 53 L. Ed. 2d 745, 756 n. 14 (1977). Based on such authorities the lower courts correctly upheld the Plans without requiring that they provide for a particular racial balance at each public school in Chicago. The Court of Appeals declared:

> "Moreover the absence of a constitutional duty on the part of the school authorities to establishing racially-based enrollments does not preclude the Board from prescribing a racial balance to remedy the segregative impact of demographic change." (A 24-25)

Petitioners' contention that as part of the stabilization quota plans each public school in Chicago must have the same racial balance as the school system as a whole is neither based on holdings of this Court nor realistic. Moreover, contrary to the footnote in the petition (p. 17), Morgan Park and Gage Park High Schools were not 50% white but rather were found by the trial court to be approximately 41% white (A 40, ¶ 26).

Petitioners fail to cite a single decision of this Court or of any other jurisdiction holding that state laws or administrative policies directed to the reduction or prevention of *de facto* segregation in the schools located in changing neighborhoods which provide all students residing there with a meaningful opportunity to attend an integrated school are constitutionally forbidden. Cases cited in the petition (pp. 13, 16-17) involving resistance to a judicial order to desegregate were also cited by petitioners to the Court of Appeals which found them irrelevant

since the stabilization quota plans prevented segregation and were not "intended to retard integration and create racial imbalance at these two high schools." (A 22).

A guaranteed, meaningful opportunity to attend high school in an integrated setting is petitioners' right under the stabilization quota plans. The record is uncontroverted that Gage Park and Morgan Park High Schools have been spared the kind of racial isolation which occurred at Fenger, Bowen, Orr and other high schools where no stabilization quota plans were instituted, and that the right of students, not admitted by lottery, to attend an integrated high school is encouraged and guaranteed by the Board through publicity, student counseling and bus transportation. Petitioners contend (p. 12) that the plans should be abolished since some minority students who are not admitted by the lottery do not avail themselves of the opportunity to attend alternative integrated high schools. However, petitioners omit to say that the pertinent integrative effects of the Plans at Morgan Park, Gage Park and alternative integrated high schools, on which the lower courts relied and pointed out in their decisions would all be lost had the stabilization plans been enjoined. The prevention of segregation and preserving of integration at multiple schools under the Plans is hardly nullified because some choose not to avail themselves of opportunities for attending an integrated high school which is offered and encouraged for all students residing in the attendance areas of the two schools. Thus, the contention that some minority students from the Gage Park or Morgan Park attendance area who refuse to attend any alternative primarily white or integrated high schools located in nearby areas* are made to suffer the "burdens of integration" in violation of the Fourteenth Amendment's equal protection clause is factually and legally in error. Petitioners, just as all students

* The list of these schools now includes five integrated or primarily white south side high schools easily accessible from Gage Park and Morgan Park. Board Report 80-73-2 adopted March 26, 1980, Transfer of Students from Gage Park and Morgan Park High School Attendance Areas.

whether minority or nonminority have no right in federal or state law to attend a particular school. *McDaniel* v. *Barresi,* 402 U. S. 39, 42 (1971); *Allen* v. *Asheville City Board of Education,* 434 F. 2d 902, 905 (4th Cir., 1970) and other cases cited and relied on by the Court of Appeals (A 20).

Since viable alternatives to attend integrated high schools located nearby are guaranteed petitioners and because they have no constitutional right to attend a particular school, the lower courts refused to abolish the Plans. To do otherwise would clear the way for racial segregation at Morgan Park and Gage Park High Schools and substitute a court's judgment for the "broad discretionary powers of school authorities . . ." Such a result would be contrary to the holdings which recognize that "local autonomy of school districts . . ." exists in cases such as this.

Petitioners contend (p. 12) that a technique which would involve "pairing" of Gage Park and Curie High Schools should have been adopted instead of the stabilization quota plans. However, the fact is that Curie High School's attendance area is not a "white enclave" as the petition infers (p. 12). Far from it, Curie is integrated now, having a 40% minority student enrollment (Student Racial Survey, October, 1979).* Pairing would be pointless to achieve integration and certainly wasteful of public funds in the case of two high schools already integrated, such as Gage Park and Curie. Curie had 76% white enrollment in 1976, but the percentage of whites dropped to 73.2% in 1977, 67.2% in 1978 and 60% in 1979. Demographic conditions and trends such as this are ignored in the petition but did not escape that attention of the lower courts. Petitioners' "alternative" proposals such as "pairing" Curie and Gage Park, both integrated high schools, clearly had no sense or merit and the lower court having studied the record rightly concluded that

* The petition refers to matters outside the record, as for example, the second footnote on page 7 of the petition. However, petitioners, were they to be fair, should also consider the public records showing more current statistics on student racial balance in the schools such as Curie High School.

petitioners' alternatives did not "offer a viable means of preventing *de facto* segregation" at Gage Park and Morgan Park High Schools (A 27). Petitioners' contention of "the Court of Appeals' failure to scrutinize . . ." their alternative proposals to the stabilization quota plans at Gage Park and Morgan Park High Schools is totally without support in the record (A 27). Moreover, in spite of declining white enrollment, Curie High School is an alternative school under the Plans and will receive minority students from nearby Gage Park as well as Morgan Park High Schools. In fact, Curie, Kennedy, Hubbard, and Bogan and Washington are all integrated or primarily white south side high schools which are not far from Gage Park or Morgan Park High Schools and which are available as alternative schools under the Plans. Petitioners' allegation (p. 15) of long travel time for students traveling to alternative integrated high schools is simply false. Upon consideration of the facts, many of which are referred to in the Court of Appeals opinion, the Plans are readily seen to be far more "helpful" and less restrictive in preserving integration than any alternative proposal of petitioners' counsel. In reviewing various solutions adopted by local school boards, the Supreme Court has consistently recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley,* 418 U. S. 717, 741-742 (1974); *San Antonio School District* v. *Rodriquez,* 411 U. S. 1, 50 (1973); *Wright* v. *Council of City of Emporia,* 407 U. S. 451, 469 (1972).

The record also shows that white students are also affected by stabilization or racial quota plans. The Whitney Young High School, Disney Elementary and Black Elementary magnet schools have racial quota plans and are attended by students from all parts of the city. Many white students have been excluded from Whitney Young High School whenever the number of whites applying has exceeded the quota. It is also true that white students enrolled at Gage Park and Morgan Park High Schools were precluded from transferring to another school

until the quota for white students has been exceeded and that when the white enrollment exceeded the established quotas they would be denied admission (A 26). No "burden of integration" exists where, as here, the voluntary plan which prevents schools from becoming segregated also guarantees each student the meaningful opportunity to attend high school in an integrated setting.

Petitioners state (petn. p. 6) that no Board member testified to the rationale for the stabilization quota plans. However, Mrs. Carey B. Preston, Vice President of the Board of Education and Chairperson of the Area B Committee stated at the committee meeting on May 13, 1975, in recommending the stabilization quota plan for Gage Park High School:

> "I said when we had all the trouble we wanted to keep it as a viable, integrated school. That is my position today, and that was my position then. That is my position today.
>
> "And I will do as I think the other (Board) members of this committe will, we will do whatever we can to try to maintain that. I believe it will ultimately be a better school because of this, because this is just reality." (Dfts. Ex. 35, p. 41; Transcript of public meeting of Board's Area B Committee.)

The statements of Board member Preston at the public meeting on the day that she and other members voted to recommend the Gage Park Plan reflect the intention that the plan was to keep Gage Park High School as a "viable integrated school" Petitioners could have called any Board member as a witness but they choose not to do so. In any case, there was no doubt that the Board's reason for the Plans was to prevent segregation. Moreover, petitioners conceded in their brief in the lower court (p. 26) that the Board, in instituting the Plans, relied on the views of its members, the district superintendents, the high school principals and their staffs, the Board's Director of Facilities Planning and members of local communities. Although no outside demographer testified for either party the

members of the Board, the General Superintendent and his staff had experience within the school system and have witnessed school after school in racially changing neighborhoods become predominantly black because of demographic change. These are the individuals best qualified to assess the circumstances at each school and after public meetings with input from community organizations, leaders, residents and parents to formulate a plan to attempt to stabilize the school population. The Board of Education and the people it relied upon in formulating these Plans have the requisite experience to make the necessary determination regarding the problems at these schools.

Petitioners also contend (petn. p. 6) the Board should not have instituted the stabilization Plans because "Kenwood High School remained constant from 1970-76 at 26% white . . . (and there is) no explanation of why Gage Park and Morgan Park were more like Fenger than Kenwood." However, one of the facts on which the lower courts relied and which was pointed out in the opinion of the Court of Appeals was that "where no stabilization quota plans were instituted, schools *situated in rapidly changing residential neighborhoods* had become racially segregated." (emphasis added) This has been true at Fenger (located immediately to the east of the Morgan Park attendance area), Orr, and Bowen High Schools and at school after school in *racially changing neighborhoods*. It is also true that the Morgan Park and Gage Park High School attendance areas were undergoing in part accelerated racial change at the same time that the two schools were tending toward segregated minority enrollment in 1975 and 1976 when the Plans were established (A 35, ¶ 4; A 40, ¶ 26).

Kenwood Academy is located at 5015 South Blackstone near the University of Chicago and is significantly affected by the University's stabilizing influence. Existing conditions have racially stabilized enrollment at Kenwood which is 12 miles away from Morgan Park and 6 miles away from Gage Park. Kenwood's close proximity to the University of Chicago area,

a community different in many respects from Gage Park or Morgan Park and the fact that enrollment has stabilized at Kenwood makes it very different from Gage Park and Morgan Park where white enrollment was sharply dropping each year and both schools were tending toward becoming segregated minority at the time the stabilization quota plans were instituted. Distance from Kenwood Academy to Morgan Park or Gage Park High Schools was also a reason that Kenwood would not be as logical a choice for comparison purposes as Fenger High School which "adjoins the Morgan Park attendance area on the east. . ." It is readily apparent to all but petitioners why Fenger and other schools referred to in the Court of Appeals opinion were rightly regarded as more comparable to Gage Park and Morgan Park High Schools than Kenwood. Petitioners fail to point out these relevant considerations in their petition for rehearing.

It is clear that if the injunctive relief plaintiffs sought were to have been granted and the quotas abolished, Gage Park and Morgan Park High Schools would have foreseeably and predictably become segregated minority just like Fenger, Orr, Bowen and other high schools. Certainly, past experience in Chicago justified the hopes and expectations of preventing such segregation by the Plans and the record clearly supports their necessity at Gage Park and Morgan Park High Schools. As the district court stated:

> "These plans were attempts on the part of the Board to relieve overcrowding and to promote integration in schools situated in rapidly changing neighborhoods. Experience has shown that the Board has achieved both objectives at each school." (A. 40, ¶ 26)

Also, based on findings on the record the Court of Appeals declared (A 20):

> "The Board's articulated purpose for the adoption of the Plans was the alleviation of overcrowding and the prevention of de facto segregation at Gage Park and Morgan

> Park High Schools. We find the state interest in promoting integration in these two high schools and communities, while at the same time affording all students residing in these attendance areas a viable opportunity to attend high school in an integrated setting, to be compelling."

Abundant evidence in the record supports the district court's findings and the judgment on appeal affirming the racial stabilization quota plans.

Petitioners have also cited no case holding that displacement of the local school authorities by a federal court is warranted where the objective evidence and reasoned legal principles show that the solution formulated by the school board successfully achieved the intended purpose of preventing segregation. The stabilization Plans, therefore, fall well within the permissible scope of local autonomy which this Court has held exists in school districts under circumstances present here. To upset the judgment of the Court of Appeals which affirmed the decree of the district court would reverse sound judicial precedent, set back immeasurably voluntary school desegregation efforts in the circuits across the country, and render communities and schools helpless victims of the segregative effects attendant upon demographic change in a City such as Chicago.

As stated by the Court of Appeals (A 23):

> "The Supreme Court has recognized that 'substantial benefits flow to both whites and blacks from interracial association. . . .' *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 94-95 (1977), and those benefits cannot be achieved in the public schols unless a school board may consider steps to resist racial segregation."

II.

THE INTEGRATIVE STABILIZATION QUOTA PLANS DO NOT SUFFER FROM THE FEDERAL LAW INFIRMITY WHICH EXISTED IN THE EXCLUSIONARY ADMISSIONS PROGRAM IN UNIVERSITY OF CALIFORNIA REGENTS v. BAKKE.

The record discloses that the instant case involves voluntary state action directed toward prevention of *de facto* segregation in the public schools through Plans which provide all students residing in the attendance areas with a meaningful opportunity to attend an integrated high school. The facts in this case show that *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978) cited by petitioners (petn. p. 15) is not in point.

The Plans have prevented Gage Park and Morgan Park High Schools from becoming segregated; have stabilized student enrollment in both schools at about 59 percent minority and 41 percent white, and have provided students not admitted to those schools with guaranteed enrollment at equivalent, integrated or primarily white high schools.* Important distinctions exist between the Gage Park and Morgan Park Plan and the admissions program of the University of California Medical School challenged in *Bakke*. Unlike the medical school program, considerations of race or ethnic status do not result in the disenfranchisement of any student in the Chicago public school system. The plans result only in placement of students at various facilities within the system. No one has barred petitioners from an equal educational opportunity unlike Allen Bakke who was totally denied admission to school notwithstanding his "benchmark" score, a cumulative rating consisting of interviewers' summaries, overall and science course grade point averages, MCAT scores, letters of recommendations, extracurricular activities and other

* Over 350 minority students from the Gage Park-Morgan Park areas availed themselves of this opportunity in the 1978-1979 school year alone and were bused by the Board to equivalent high schools furthering integration there (A 14).

biographical data, was higher than those scores of some special candidates admitted to the medical school. Other circuits have distinguished the *Bakke* case from school desegregation cases just as the 7th Circuit has in the case at bar. In *Morrow* v. *Dillard,* 580 F. 2d 1284, 1293 (5th Cir. 1978) the Court stated:

> "The medical school had contended that on several occasions the Court had approved preferential classifications without applying the most exacting scrutiny. Justice Powell emphasized that the cases cited, drawn from the areas of school desegregation, employment discrimination and sex discrimination, were materially different from the facts presented in *Bakke.*

See also *Livingston* v. *Ewing,* 601 F. 2d 1110 (10th Cir. 1979); *Marton* v. *Charlotte-Mecklenburg Bd. of Ed.,* 475 FS 1318, 1345 (W. D. N. C., 1979).

In sum, *Allan Bakke's* strong qualifications, his total exclusion from school and admission of others less qualified to school solely because of race; the fact that enrollment at the medical school was not shifting inexorably to a segregated minority student body as it was at Gage Park and Morgan Park High Schools, are among the salient facts which distinguish *Bakke* from the situation in the case at bar. The absolute exclusion of a strongly qualified applicant from professional school because of race as in *Bakke* was in sharp contrast to the plans which have prevented racial segregation at Morgan Park and Gage Park High Schools and have guaranteed students from those attendance areas a meaningful opportunity to attend Chicago public high schools with primarily white or integrated enrollments. The alternative, integrated high schools are educationally equivalent to either Morgan Park or Gage Park High School and the lower court, familiar with the record, rightly observed that hundreds of minority students are being transported under the Plans to white or integrated high schools. Had there been no Plan at Morgan Park and Gage Park, or

had it been enjoined, those 350 students and all students attending those two schools would be attending schools which would foreseeably and most likely be segregated. "Loss of opportunity" to attend a "neighborhood" high school which would not be integrated but for the stabilization quota plans, cannot begin to compare with total loss suffered by Bakke.

The contention (petn. p. 16) that stabilization quota plans are infirm unless they are adopted specifically to correct a prior finding of a constitutional violation is error since this Court specifically declared that "School authorities . . . might well conclude . . . each school should have a prescribed ratio of Negro to white students . . . within the broad discretionary powers of school authorities." *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 16 (1971). The lower court correctly decided the Plans in the instant case were a proper exercise of the discretionary power of school authorities stating (A 18):

> "In the case at bar, the Chicago Board of Education voluntarily adopted a desegregation Plan designed to prevent *de facto* racial segregation at two public high schools. The record is uncontroverted that prior to the implementation of the Plans, the attendance areas for Gage Park and Morgan Park High Schools were rapidly changing in residential occupancy from white to black and the trend in enrollments was toward segregated student bodies. The district court found, based on a voluminous record, that the Plans successfully arrested this trend and concluded that, as a result of the Board's modification of the Plans, all high school students living in those attendance areas were provided with a meaningful and viable opportunity to attend an integrated high school.
>
> "Accordingly, in view of the broad statutory powers vested in the Board to formulate and to implement educational policy, including the establishment of programs designed to preserve integration in the public schools, we regard the Board's efforts to prevent *de facto* segregation as a legitimate exercise of its discretionary authority consistent with its legislative mandate and established principles of local school autonomy."

See also *Milliken* v. *Bradley*, 418 U. S. 717, 741-742 (1974); *San Antonio Independent School District* v. *Rodriquez*, 411 U. S. 1, 49 (1973); *Wright* v. *Counsel of City of Emporia*, 407 U. S. 451, 469 (1972).

CONCLUSION.

The Court of Appeal's judgment and opinion in this case follows judicial precepts, is in accordance, not in conflict, with prior judicial decisions and correctly applies the law to the relevant facts in the record. For these reasons as well as the reasons contained in the body of this brief, defendants urge that the petition for writ of certiorari be denied.

Respectfully submitted,

BOARD OF EDUCATION OF THE CITY OF CHICAGO, etc., et al.,
Defendants-Respondents.

MICHAEL J. MURRAY,
228 North LaSalle Street,
Chicago, Illinois 60601,
Attorney for Respondents.

RICHARD E. GIRARD,
Of Counsel.